**UNITED STATES DISTRICT COURT**

**DISTRICT OF CONNECTICUT**

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| SECURITY INSURANCE COMPANY OF HARTFORD, | : | |
| Plaintiff, | : | |
| | : | |
| -vs- | : | Civ. No. 3:01cv2198(PCD) |
| | : | |
| TRUSTMARK INSURANCE COMPANY, | : | |
| Defendant. | : | |

**RULING ON MOTION TO DISMISS**

Defendant moves to dismiss the complaint pursuant to FED. R. CIV. P. 12(b)(1) and 12(b)(6). For the reasons set forth herein, the motion is **granted in part**.

I. BACKGROUND

In early 1999, plaintiff agreed to reinsure TIG for certain workers' compensation risks ("TIG agreement"). The TIG Agreement provided reinsurance for a twenty-four month period commencing January 1, 1999. The same year, defendant agreed to reinsure plaintiff for 100% of the risk ceded to it by the TIG Agreement ("Retrocession Agreement"). The Retrocession Agreement provided reinsurance during the term of the TIG Agreement.

In the Fall of 1999, defendant notified plaintiff that it intended to cancel the agreement after twelve months on December 31, 1999. TIG insisted that plaintiff adhere to the twenty-four month period of the TIG Agreement. In an attempt to resolve the incompatible agreements, plaintiff negotiated with TIG to limit the TIG Agreement. Plaintiff was partially successful in limiting the term of the TIG Agreement to twelve months; however, the modified TIG Agreement required that plaintiff would cover losses on policies issued by TIG during the original twelve-month period for an additional twelve

months ("runoff period"). Defendant refused to accept the terms of the modified TIG Agreement and insisted that it had no further obligation to cover plaintiff's losses after the expiration of the original twelve-month period.

II. DISCUSSION

In its complaint plaintiff's complaint seeks a declaration that defendant's cancellation of the Retrocession Agreement was impermissible ("Count 1"). Plaintiff further alleges breach of the Retrocession Agreement ("Count 2"), violation of the Connecticut Unfair Trade Practices Act ("CUTPA"), CONN. GEN. STAT. §§ 42-110a *et seq.* predicated on a violation of the Connecticut Unfair Insurance Practices Act ("CUIPA"), CONN. GEN. STAT. §§ 38a-815 *et seq.* ("Count 3"), a tortious breach of the duty of good faith and fair dealing ("Count 4") and an alternative claim of unjust enrichment if defendant is found to have properly canceled the Retrocession Agreement ("Count 5").[1]

**A. Standard**

A case may be dismissed for lack of subject matter jurisdiction pursuant to FED. R. CIV. P. 12(b)(1) when a court lacks the statutory or constitutional power to adjudicate. *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000). A court may refer to evidence outside the pleadings in resolving a motion to dismiss for lack of subject matter jurisdiction. *Id.* Plaintiff has the burden of proving by a preponderance of evidence the existence of subject matter jurisdiction. *Id.*

[1] The claims involved herein are matters of state, not federal, law. As the choice of law issue was resolved in the ruling on the motion for summary judgment in *Security Insurance Co. of Hartford v. Trustmark Insurance Co.*, 3:00cv1247, involving the same parties and the same Retrocession Agreement, and absent argument from the parties that the law of another state is more applicable, Connecticut law is deemed to apply.

A motion to dismiss pursuant to FED. R. CIV. P. 12(b)(6) is properly granted when "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *In re Scholastic Corp. Sec. Litig.*, 252 F.3d 63, 69 (2d Cir. 2001) (internal quotation marks omitted). A motion to dismiss must be decided on the facts as alleged in the complaint. *Merritt v. Shuttle, Inc.*, 245 F.3d 182, 186 (2d Cir. 2001). All allegations are assumed to be true and are considered in the light most favorable to the non-movant. *Manning v. Util. Mut. Ins. Co.*, 254 F.3d 387, 390 n.1 (2d Cir. 2001).

**B. Count 1 is Sufficiently Alleged**

In Count 1, plaintiff alleges that it is "entitled to a declaration . . . that [defendant] has no right to rescind the retrocession agreement and that [defendant] remains bound by that agreement." Defendant argues that plaintiff, having failed to allege that it will unequivocally perform under its reinsurance contract with TIG, may not seek indemnity from defendant.

There can be little dispute with defendant's argument that a reinsurance contract is a contract of indemnity. *See Cont'l Cas. Co. v. Stronghold Ins. Co.*, 77 F.3d 16, 19 (2d Cir. 1996). It is further without question that a duty to indemnify does not arise until the occurrence of certain events. *Fairfield v. D'Addario*, 149 Conn. 358, 361, 179 A.2d 826 (1962).

> As to the time when a cause of action accrues under a contract of indemnity, such contracts can be broadly classified as those which indemnify against liability and those which indemnify against loss. In the former, the cause of action arises as soon as the liability of the indemnitee is incurred; in the latter, the cause of action arises when the indemnitee has actually incurred the loss.

*Id.*

These points are, however, academic and premised on an erroneous interpretation of plaintiff's claim. Count 1 seeks a determination of whether defendant properly terminated an agreement.

Whether the agreement is one of indemnity or whether defendant breached a duty to indemnify is not germane to a determination of whether cancellation was permitted under the reinsurance agreement.[2] The question goes to the contractual source of the duty to indemnify, not the duty itself. Although the indemnor can breach the duty to indemnify after the indemnee suffers a loss or incurs liability, *see id.*, the contractual source of that duty is not dependent on such a precondition. The logical implication of defendant's argument would render all contracts to indemnify ineffective and subject to arbitrary cancellation by the indemnor. If, after an impermissible cancellation, no duty to indemnify were to arise while the contract was in force, then the issue would be resolved by a finding that the agreement was breached but that the breach caused no damage to the indemnee. It would not, however, preclude a finding that there was a breach of contract because of the cancellation. The argument is therefore without merit and Count 1 will not be dismissed.

**B. Count 2 is Sufficiently Alleged**

Plaintiff alleges in Count 2 that "[b]y failing to pay claims properly ceded to it under the retrocession agreement, Trustmark has breached the agreement, causing damages to Security" and that it is therefore entitled to recover an amount equal to the present amount owed plus the present value of future performance under the agreement. Defendant argues that plaintiff must first allege unequivocally that it has paid claims to TIG.

Although a reinsurance contract is, in many respects, a contract of indemnity, it is not necessarily so limited. In contrast to the typical duty to indemnify, "[i]t is not necessary that the

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[2] Assuming arguendo that the question of losses incurred need be pled, plaintiff alleges that "[t]he estimated 1999 losses that Trustmark will be required to pay Security are $89,000,000. This figure represents $16,713,898 in losses currently due from Trustmark, for which Security has requested but not received payment, and approximately $72,000,000 in additional losses that Security estimated Trustmark will be required to pay."

reinsured should first pay the loss to the party first insured before proceeding against the reinsurer upon his contract." *Macdonald v. Aetna Indem. Co.*, 88 Conn. 571, 581, 92 A. 154 (1914). "The contract is thus made, not merely one of indemnity, but one requiring payment by the reinsurer to the reinsured of the former's pro rata amount of losses as they accrue, altogether regardless of payment by the reinsured or his ability to pay." *Id.*

Defendant's argument therefore fails on two grounds. First, the failure to allege a loss is not necessarily fatal to plaintiff's claim. An allegation of liability may itself suffice to implicate the duty to indemnify. *See Fairfield,* 149 Conn. at 361. Next, the reinsured need not actually pay the amount claimed prior to seeking indemnity from a reinsurer. *See Macdonald*, 88 Conn. at 581. Plaintiff's failure to affirm unequivocally its obligations to TIG is therefore not fatal to its claim for indemnity. Defendant's motion is therefore denied as to Count 2.

**C. Count 3 is Sufficiently Alleged**

Plaintiff alleges that defendant's "prolonged, repeated, and wanton reckless, or willful practice of refusing to pay claims properly ceded to it by [plaintiff] (and others) . . . constitutes a general business practice that violates . . . CUIPA. Because [defendant's] actions violate CUIPA, they also violate CUTPA . . . ." Defendant argues that CUIPA does not apply to reinsurers and thus both the CUIPA and CUTPA claims fail.

Defendant's argument[3] is construed as whether CUIPA applies to reinsurance relationships, i.e. agreements between two insurance companies, or rather whether a reinsurance contract may be

[3] Defendant's argument appears to implicate a public policy limiting the applicability of CUIPA to primary insurance relationships. Defendant derives this public policy from statements within legislative history and various provisions within the statute. Defendant does not, however, cite to specific language that would exclude reinsurance agreements from regulation of CUIPA and it is therefore not apparent the language claimed to be ambiguous would justify the construction proposed.

considered "in the business of insurance."[4] Defendant argues, citing *Stabile v. Southern Conn. Hosp. Sys.*, No. 326120, 1996 WL 651633 (Conn. Super. Oct. 31, 1996), that CUIPA is a consumer protection statute, thus reinsurance transactions would not come within its ambit.

CUIPA is based on the model insurance trade practices act, which was drafted in response to the enactment of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b). *See Mead v. Burns*, 199 Conn. 651, 659, 509 A.2d 11 (1986). Through CUIPA, "the legislature intended to preserve state regulation of insurance practices." *Id.* The specific subsection at issue, CONN. GEN. STAT. § 38a-816(6), was added following a 1971 amendment to the model act. *Id.*

The McCarran-Ferguson Act therefore played a significant role in the development of CUIPA. The interplay of the two statutes defines the bounds of federal and state jurisdiction. *See id.*; *see also Stephens v. Am. Int'l Ins. Co.*, 66 F.3d 41, 49 (2d Cir. 1995) ("McCarran-Ferguson preserves state statutes, enacted for the purpose of regulating the business of insurance, from preemption and leaves the regulation of the business of insurance to the states" (internal quotation marks omitted)). The demarcation between the two statutes is whether acts or practice may be defined as the "business of insurance."

Whether a particular act or practice may be defined as the business of insurance for purposes of the McCarran-Ferguson Act is established through the following three-part test: (1) "whether the practice has the effect of transferring or spreading a policyholder's risk"; (2) "whether the practice is an integral part of the policy relationship between the insurer and the insured"; and (3) "whether the

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[4] CONN. GEN. STAT. § 38a-815 provides that "[n]o person shall engage in this state in any trade practice which is defined in section 38a-816 as, or determined pursuant to sections 38a-817 and 38a-818 to be, an unfair method of competition or an unfair or deceptive act or practice *in the business of insurance*, nor shall any domestic insurance company engage outside of this state in any act or practice defined in subsections (1) to (12), inclusive, of section 38a-816" (emphasis added).

practice is limited to entities within the insurance industry." *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 782, 113 S. Ct. 2891, 125 L. Ed. 2d 612 (1993). Applying this test, reinsurance practices are defined as practices in the business of insurance. *Stephens*, 66 F.3d at 49.

Although the above test applies to matters of federal jurisdiction rather than state law, there is nothing to suggest that Connecticut law provides otherwise. Connecticut law does not specifically define "business of insurance" for purposes of CUIPA. Insurance, however, is defined as

> any agreement to pay a sum of money, provide services or any other thing of value on the happening of a particular event or contingency or to provide indemnity for loss in respect to a specified subject by specified perils in return for a consideration. In any contract of insurance, an insured shall have an interest which is subject to a risk of loss through destruction or impairment of that interest, which risk is assumed by the insurer and such assumption shall be part of a general scheme to distribute losses among a large group of persons bearing similar risks in return for a ratable contribution or other consideration.

CONN. GEN. STAT. § 38a-1(11). It is not apparent that reinsurance agreements would not meet this definition. Reinsurance contracts are characterized as insurance contracts. *See* CONN. GEN. STAT. § 38a-298 ("Contracts for reinsurance shall be deemed insurance contracts, but the hazard under such contracts is declared to be distinct in nature from the hazard originally insured."). Defendant therefore has not established a basis on which to exclude reinsurance agreements or practices from CUIPA regulation. Defendant's motion to dismiss is therefore denied as to Count 3.

**D. Count 4 Fails to State a Claim**

In Count 4, plaintiff alleges a "tortious breach of the independent duty of good faith and fair dealing." Defendant argues that Connecticut has not recognized a tortious cause of action as alleged.

A number of superior courts have held that a cause of action in tort lies for breach of an implied covenant of good faith and fair dealing. *See, e.g., Grand Sheet Metal Prods. Co. v. Prot. Mut. Ins.*

*Co.*, 34 Conn. Supp. 46, 375 A.2d 428 (1977). This is not necessarily the view of all Superior Courts, *see Greenwoods Scholarship Found., Inc. v. Northwest Cmty. Bank*, No. CV960558956S, 1999 WL 417939, at *4 n.5 (Conn. Super. June 4, 1999) (recognizing that superior courts are split on the question), nor has the Connecticut Supreme Court adopted a tortious cause of action. *See Barry v. Posi-Seal Intern., Inc.*, 40 Conn. App. 577, 585 n.7, 672 A.2d 514 (1996) ("We leave for another day the question of whether a separate cause of action, in tort or in contract, ever lies for the breach of an implied covenant of good faith and fair dealing, absent a claim that the breach constitutes a violation of public policy.")

As the issue has not yet been resolved, this Court must predict how the forum state's highest court would decide the issue. *McCarthy v. Olin Corp.*, 119 F.3d 148, 154 (2d Cir. 1997). In *Triangle Sheet Metal Works, Inc. v. Silver*, 154 Conn. 116, 127-28, 222 A.2d 220 (1966), the Connecticut Supreme Court reversed an award of punitive damages for breach of contract for failure to allege "wanton and malicious injury, evil motive and violence." Seizing on the language in *Silver*, the Connecticut Appellate Court recognized the potential for a tortious cause of action in *L.F. Pace & Sons, Inc. v. Travelers Indemnity Co.*, 9 Conn. App. 30, 47-48, 514 A.2d 766 (1986)("there must be an underlying tort or tortious conduct alleged and proved to allow punitive damages to be granted on a claim for breach of contract, express or implied"). The dicta in these cases, in addition to the split evident in superior courts, does not alter the previous holding of this Court that Connecticut has not, and would not, establish a cause of action in tort for an implied breach of the covenant of good faith and fair dealing separable from the contract claim in Count 2. *See Gen. Elec. Capital Corp. v. DirectTV*, 94 F. Supp. 2d 190, 202 (D. Conn. 1999)("In Connecticut, there is no cause of action for tortious breach of contract separable from a breach of contract claim." (internal quotation marks omitted)). The

motion to dismiss is therefore granted as to Count 4.

**E. Count 5 Adequately Alleges a Case or Controversy**

In Count 5, plaintiff alleges that "if . . . [defendant] is entitled to rescind the retrocession agreement, then [plaintiff] will be entitled to return of the 1999 cash premium that [defendant] currently is holding" and seeks an order directing defendant to return the premium. Defendant argues that its stipulation as to the legal consequences of a rescission of the agreement renders the claim non-justiciable and plaintiff must first request payment before there is an actual controversy.

Plaintiff alleges unjust enrichment to the extent of premiums paid for which no reinsurance was provided. *See Bernstein v. Nemeyer*, 213 Conn. 665, 669, 570 A.2d 164 (1990). A plaintiff claiming unjust enrichment must establish (1) that defendant was benefitted, (2) that defendant unjustly did not pay plaintiff for the benefit and (3) that the failure to pay plaintiff was to the plaintiff's detriment. *Hartford Whalers Hockey Club v. Uniroyal Goodrich Tire Co.*, 231 Conn. 276, 283, 649 A.2d 518 (1994). The stipulation provides that "[i]f [defendant] is permitted to rescind the Retrocession Agreement in its entirety, it *will be required to return* to [plaintiff] the cash premium that [defendant] has received under the Retrocession Agreement, or $51,607,710.25." (Emphasis added).

The distinction between the choice of words "will be required to return" and "will return" is significant. The former connotes a stipulation as to the amount of funds benefitted while the latter resolves any controversy. As drafted, the stipulation may only be read as an agreement as to the amount of the benefit. Defendant has provided no authority that would require that plaintiff first seek payment of the funds after a judgment in defendant's failure, followed by a refusal by defendant to pay the same, at which time plaintiff would be required to file a separate complaint claiming unjust enrichment. Under the stipulation as written, defendant has not agreed to return the funds it now holds,

thus there remains an active controversy as to the disposition of those funds.

III. CONCLUSION

Defendant's motion to dismiss (Doc. 45) is **granted in part**. Count 4 is dismissed.

SO ORDERED.

Dated at New Haven, Connecticut, August ___, 2002.

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Peter C. Dorsey
United States District Judge